Supreme Court, U.S.
FILED
APR 26 2004
OFFICE OF THE CLERK

No. 03-867

IN THE
Supreme Court of the United States

CF INDUSTRIES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The Federal Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

DANIEL G. JARCHO
Counsel of Record
PETER BUCK FELLER
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioner

RULE 29.6 DISCLOSURE

Petitioner CF Industries, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

RULE 29.6 DISCLOSURE i

TABLE OF AUTHORITIES iii

ARGUMENT 1

A. The Court of Appeals' Decision Under the Uniformity Clause Conflicts With the Premise of This Court's Decision in *United States Shoe* 1

B. The Court's Review Should Address the Substantive Scope of the Uniformity Clause 4

C. The Court Should Grant the Petition to Address the Question Whether the Port Preference Clause Remains a Meaningful Limit on Congressional Power 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982) 8

Edye v. Robertson (Head Money Cases), 112 U.S. 580 (1884) 5, 6

Kansas v. United States, 16 F.3d 436 (D.C. Cir. 1994) 8

Massachusetts v. United States, 435 U.S. 444 (1978) 2

Pace v. Burgess, 92 U.S. 372 (1875) 2

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 5, 6

United States v. IBM Corp., 517 U.S. 843 (1996) 2, 3

United States v. Lopez, 514 U.S. 549 (1995) 7

United States v. Ptasynski, 462 U.S. 74 (1983) ..... *passim*

United States v. United States Shoe Corp., 523 U.S. 360 (1998) 1

CONTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 9, cl. 6 8

STATUTES

U.S.C. § 4462(b)(1)(A)-(D) 9

Petitioner CF Industries Inc., respectfully submits this reply to the government's brief in opposition to the petition for writ of certiorari in this case.

ARGUMENT

A. The Court of Appeals' Decision Under the Uniformity Clause Conflicts With the Premise of This Court's Decision in *United States Shoe*

The government asserts that the court of appeals was free to decide that the HMT is a user fee and not a tax, notwithstanding this Court's contrary decision, in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), that the HMT is a tax and not a user fee. (Opp. at 9-11.) The government's assertion does not withstand scrutiny. The question whether the HMT is a tax or a user fee turns upon the relationship between the monetary assessment, on the one hand, and the government services that the assessment would fund, on the other. (Pet. at 9.) The government implicitly concedes, through its silence, that the assessment, the government service, and the relation between the two are the same in this case as in *United States Shoe*. (*See id.* at 9-10.) The holding of *United States Shoe* therefore controls this case and foreclosed the court of appeals from holding that the HMT is a user fee and not a tax. The Court should grant review where, as here, a court of appeals issues a decision that flouts a ruling of this Court.

1. The government attempts to reconcile the court of appeals' decision with *United States Shoe*, by asserting that *United States Shoe* adopted a definition of "tax" unique to the Export Clause context. (Opp. at 9-10.) The government's citations to the *United States Shoe* opinion do not prove its point. *First*, the government cites language from *United States Shoe* indicating that the Export Clause is a stricter *limitation* on the taxing power than other limitations on that power. (*Id.* at 9.) Yet the definition of

what constitutes a tax does not change in different provisions of Article I simply because such limitations may differ from provision to provision. (*See* Pet. at 11.) *Second*, the government does not prove its point by noting *United States Shoe*'s reliance on an Export Clause precedent (*Pace v. Burgess*, 92 U.S. 372 (1875)). (Opp. at 9.) The government does not even respond to CF Industries' explanation that the Court relied on *Pace* because the other precedents that the Court distinguished did not address the specific textual question presented – namely the difference between an Article I "tax" or "duty" and a user fee. (*Compare* Opp. at 9 *with* Pet. at 11-12.)[1]

2. By asserting that the court of appeals properly limited *United States Shoe* to the Export Clause context, the government tacitly confirms that the court of appeals gave the terms "tax" and "duty" different meanings under the Export Clause than under other provisions of Article I. As the petition demonstrates, the logic of the court of appeals' decision is that the terms indirect "tax" and "duty" mean something different under the Export Clause than under the Uniformity Clause (and related provisions). (Pet. 13-15.) That is because (as the government does not dispute) *United States Shoe* concluded that the HMT *is* an indirect "tax" or "duty," whereas the court of appeals concluded that the HMT is *not* an indirect "tax" or "duty." (*Id.*) The government's sole response to this crucial point is a cryptic citation to *United States v. IBM Corp.*, 517 U.S. 843 (1996). (Opp. at 10.) *IBM* is wholly consistent with CF Industries'

---

[1] The government also is wrong when it asserts that the HMT meets the test for a user fee set out in *Massachusetts v. United States*, 435 U.S. 444 (1978). (Opp. at 8-9.) Among other things, the HMT assessment is not based on a fair approximation of use, given that there is "little relationship" between the *ad valorem* assessment and the harbor maintenance services it funds. (Pet. at 19 (citing 131 Cong. Rec. H9737 (daily ed. Nov. 6, 1985)).)

analysis, which demonstrates that there are only two types of Article I "taxes" (direct and indirect); that every indirect "tax" is either a "duty," "impost," or "excise"; and that this Court has always interpreted those terms the same way in different provisions of Article I. (Pet. at 13-14.) *IBM* simply holds that under Article I there are some "taxes" – such as direct "taxes" – that are neither "duties" nor "imposts." *See* 517 U.S. at 857-58 & n.6 (referring to direct taxes on capitation and property as examples of assessments that are taxes but not imposts or duties). In making that point, the *IBM* court interpreted the term "duty" the same way under the Export Clause and the Import-Export Clause. (Pet. at 16.) *IBM* therefore supports the conclusion that this Court has interpreted the terms of Article I the same way wherever they appear, contrary to the court of appeals' decision.

3. The government attempts to minimize the significance of the court of appeals' decision, even though the decision has binding effect nationwide because of the court of appeals' exclusive jurisdiction over matters involving revenues raised at the ports. The government does not deny that the court of appeals' decision would substantially undermine the coherence of the taxation regime that the Founders designed under Article I (Pet. at 17-18); that the federal budget process would be disrupted if taxes could be characterized also as user fees (*id.* at 18-21); or that the legislative process would be disrupted if the same assessment could be characterized both as a tax and as a user fee (*id.* at 21-23). The government simply asserts that these "are consequences that chiefly would be felt in (and could be rectified by) Congress." (Opp. at 12.) Undermining the integrity of the Article I taxation regime plainly creates deleterious effects to the constitutional scheme well beyond the halls of Congress. And the consequences of the court of appeals' ruling would not be diminished even if they would be chiefly felt in that coordinate branch of government. Furthermore, a number of the consequences (*e.g.*, whether

the power to impose an assessment may be delegated to an administrative agency and whether the House of Representatives must initiate the measure raising the assessment) could not be avoided by Congress, because they derive from the structure of government imposed by the Constitution. Finally, it is no answer to these problems for the government to assert that Congress intended the HMT to be a user fee. (*Id.* at 7, 12.) That assertion is refuted by the fact that the HMT is denominated a "tax" and codified in the Internal Revenue Code, and by the congressional committees' awareness that an *ad valorem* assessment has too remote a connection to harbor use to be properly viewed as a user fee. (*See* Pet. at 19-20.) In any event, as the government necessarily concedes (Opp. at 7 n.3), Congress's intent does not control the constitutional question whether the HMT is an indirect "tax" or "duty" within the meaning of Article I.

B. The Court's Review Should Address the Substantive Scope of the Uniformity Clause

The government does not deny that the court of appeals' decision left intact a significant, nationally binding interpretation of the Uniformity Clause affecting more than 1,000 other cases and approximately $1 billion in taxes. The government also does not dispute that this Court should address the merits of the Uniformity Clause issue if it grants review. In discussing the Uniformity Clause, the government relies solely on a merits argument that does not square with this Court's Uniformity Clause decisions.

1. The HMT violates the Uniformity Clause because the subject of the tax – "port use" defined as cargo unloadings – is taxed differently in Alaska and Hawaii than in the other coastal ports. (*See* Pet. at 3-5, 24-25.) The government responds by asserting that the same subject may be taxed differently in different areas of the country, as long

as Congress does not intend to disadvantage particular unfavored states. (Opp. at 13-14.) That assertion directly contradicts the longstanding Uniformity Clause jurisprudence requiring that a tax must operate "with the same force and effect in every place where the subject of it is found." *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 594 (1884); *see also United States v. Ptasynski*, 462 U.S. 74, 82 (1983) (once Congress has defined the class to be taxed, the tax must "apply wherever the classification is found."). Furthermore, the government's argument gains no support from this Court's statement that "'[t]he Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems.'" (Opp. at 12 (citing *Ptasynski*, 462 U.S. at 84).) When read in context, the cited passage means only that Congress need not confine its taxes to subjects that exist throughout the entire country, and may properly tax a subject that exists only within particular geographic areas, *as long as the tax treats that subject the same way throughout those particular areas.*[2]

---

[2] This meaning is plain from the two precedents that the Court cited in *Ptasynski* to support its statement concerning "geographically isolated problems." The first citation is to the *Head Money Cases*, which held that Congress could properly impose an immigration tax in a specific geographic area – the coastal ports – because the subject of the tax only existed within that area, and the tax was imposed uniformly within that area. *Ptasynski*, 462 U.S. at 84 (citing the *Head Money Cases*, 112 U.S. at 595). *Ptasynski's* second citation regarding "geographically isolated problems" is to the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), which affirmed the constitutionality of a railroad reorganization statute that applied in only two regions of the country. *Ptasynski*, 462 U.S. at 84-85 (citing the *Regional Rail Reorganization Act Cases*, 419 U.S. at 156-161). The *Regional Rail Reorganization Act Cases* held that the statute complied with constitutional uniformity requirements because no railroad reorganizations existed outside of those two regions during the life of the statute; the statute therefore treated the subject of the legislation – railroad reorganizations – the same way

(footnote continued on next page)

2. In addition, the government's assertion that *Ptasynski* forecloses CF Industries' challenge to the HMT (Opp. at 13) has no basis. The government's interpretation of *Ptasynski* is wrong, because it conflicts with the fundamental premise of the Court's decision: the longstanding rule that an indirect tax must operate "'with the same force and effect in every place where the subject of it is found.'" *Ptasynski*, 462 U.S. at 82 (quoting the *Head Money Cases*, 112 U.S. at 594). *Ptasynski* repeatedly invoked that rule. *See id.* at 82 (the Framers "intended only that the tax apply wherever the classification is found"); *id.* at 84 ("As construed in the *Head Money Cases*, the Uniformity Clause requires that an excise tax apply, at the same rate, in all portions of the United States where the subject of the tax is found."). When it applied the rule in *Ptasynski*, the Court held that the windfall profits tax at issue complied with the Uniformity Clause, by treating windfall profits the same way wherever they occurred. Although the statute exempted specific isolated regions of Alaska from the tax, no windfall profits would be generated in those regions, and windfall profits therefore were taxed the same way wherever they actually did exist. Application of the same rule in the present case requires reversing the court of appeals' judgment, because certain "port use" is not taxed in Alaska and Hawaii but is taxed in the other coastal states where such "port use" occurs.

3. The government's effort to merge its analysis of the

(footnote continued from previous page)

wherever they actually occurred. It is significant here that the *Regional Rail Reorganization Act Cases* characterized Congress's power to address regional concerns through such a geographically neutral statute as the authority to address "geographically isolated problems." *Regional Rail Reorganization Act Cases*, 419 U.S. at 159. The Court used the same phrase to refer to the same concept in *Ptasynski*.

Uniformity Clause with its analysis of the Port Preference Clause (Opp. at 13) also does not withstand scrutiny. The tests for unconstitutional assessments are entirely different under the two Clauses. Under the Uniformity Clause, a tax statute is unconstitutional if it does not treat the same subject the same way in all geographic areas of the country. *See supra*. Under the Port Preference Clause, a tax statute is unconstitutional if it grants an express preference to all of the ports of a state. (Pet. at 26.)

C. The Court Should Grant the Petition to Address the Question Whether the Port Preference Clause Remains a Meaningful Limit on Congressional Power

The Court also should grant the petition to address the question whether the Port Preference Clause remains a meaningful limit on congressional power.

1. The government confirms that this Court's Port Preference Clause decisions establish two elements for an unconstitutional preference: (1) it must be expressly granted by statute; and (2) it must favor all of the ports of a state. (Opp. at 14.) However, the government also agrees with the court of appeals that there is an additional third element – the preference must derive from "illicit" favoritism for one state over another. (*Id.*) That third element does not appear anywhere in this Court's Port Preference Clause decisions.[3] As a result, the government seeks to graft the third element

---

[3] The government cites a passing reference to the Port Preference Clause in Justice Thomas's concurring opinion in *United States v. Lopez*, 514 U.S. 549, 587 (1995), which is focused on the meaning of the Commerce Clause and the term "commerce" as it appears in the Port Preference Clause. (*See* Opp. at 16.) That concurring opinion did not purport to construe the meaning of a "preference" under the Port Preference Clause.

onto the Port Preference Clause from this Court's Uniformity Clause decision in *Ptasynski* (*see* Opp. at 15-16) and from lower court opinions (*see id.* at 16). The government misconstrues these decisions.[4] Furthermore, the question whether the government is correct in its extrapolation from these other sources of law is a question of substantial national importance warranting this Court's review, because the interpretation proffered by the government and the court of appeals would eviscerate the protections of the Port Preference Clause. (Pet. at 26-29.) The court of appeals has exclusive intermediate-level appellate jurisdiction over cases involving the revenue laws at the ports, and denying review would allow the court of appeals' limiting interpretation of the Port Preference Clause to stand as binding precedent nationwide. The Court should grant review to delineate the scope of the constitutional protections in this important area.

2. The government's merits arguments do not detract from the case for Supreme Court review. The government has absolutely no basis for asserting that the preference for the ports of Alaska and Hawaii is merely "incidental[ ]."

---

[4] *Ptasynski* did not turn on favoritism for one state over another and instead reiterated that a tax is unconstitutional simply because it treats the same subject differently in different geographic areas. *Supra* at 5-6. The two lower court opinions cited by the government also do not support its argument. *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982) states (correctly) that a preference must be expressly stated in a statute to be unconstitutional. The government also grossly misconstrues a passage in *Kansas v. United States*, 16 F.3d 436 (D.C. Cir. 1994) indicating that the Port Preference Clause was designed to preclude Congress from requiring ships sailing to one state from entering and clearing at another state. (*See* Opp. at 16.) The Port Preference Clause is divided into two subclauses – the first precludes Congress from granting port preferences, and the second precludes "Vessels bound to, or from, one State" from being "obliged to enter, clear, or pay Duties in another." U.S. CONST. art. I, § 9, cl. 6. The cited passage from *Kansas* obviously refers to the second subclause, even though only the first subclause is relevant here.

(Opp. at 15.) The HMT statute grants an express exemption, in stark contrast to the statutes that this Court has upheld under the Port Preference Clause, which have been geographically neutral on their face even if they have generated incidental disparate effects on the ports of a state. (*See id.* at 14.) Furthermore, the government concedes that in the HMT statute, Congress specifically intended to benefit Alaska and Hawaii (but not any of the other coastal states) through the HMT exemption. (*Id.*)

3. In addition, contrary to the government's assertions (*id.* at 15), the HMT statute does favor all of the ports of two states (Alaska and Hawaii). The government does not, and cannot, dispute that cargo unloadings are tax-exempt in Alaska and Hawaii, but not in any of the other coastal states, if they are either (1) unloadings of cargo from intrastate shipments or (2) unloadings of cargo shipped from any of the "lower 48" states. (Pet. at 4-5.) The government instead tries to change the subject to a third category of shipments: cargo shipped *to* any state *from* Alaska or Hawaii. (Opp. at 15.) The government then tries to blur the distinction between the three categories of shipments described above by claiming that the statute exempts a single type of merchandise that is treated the same way everywhere. (*Id.*) The government's analysis conflicts with the structure of the HMT statute, which confirms the distinctness of the three categories of shipments by assigning each to a different subsection. *See* 26 U.S.C. § 4462(b)(1)(A)-(D).[5] The Court should grant review because two of these subsections (*i.e.*,

---

[5] Furthermore, even if the three categories were considered together, the HMT statute plainly treats "port use" preferentially in Alaska and Hawaii compared to the other coastal states. In Alaska and Hawaii, unloadings of cargo from domestic sources are always tax-exempt, whereas in all of the other coastal states, unloadings of cargo from domestic sources are always taxed, unless the cargo comes from Alaska or Hawaii.

those regarding intrastate shipments and shipments from the "lower 48" states) grant an express preference for all of the ports of Alaska and Hawaii.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

DANIEL G. JARCHO
Counsel of Record
PETER BUCK FELLER

MCKENNA LONG &
ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioners

April 26, 2004